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4 Attorneys for Defendant

5 UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

6 UNITED STATES OF AMERICA,	)	
	)	CR-13-6070-WFN
7 Plaintiff,	)	
	)	MOTION FOR DISCOVERY
8 vs.	)	AND PRETRIAL DISCLOSURES
	)	
9 KENNETH RICHARD ROWELL,	)	<b>Noted With Oral Argument</b>
	)	<b>February 24, 2014 at 11:00 a.m.</b>
	)	<b>Yakima, Washington</b>
10 Defendant.	)	
	)	
	)	

12 TO: MICHAEL C. ORMSBY, UNITED STATES ATTORNEY  
13 ALEXANDER C. EKSTROM, ASSISTANT UNITED STATES ATTORNEY

14 KENNETH RICHARD ROWELL hereby makes formal demand upon  
15 the government to produce discovery and pretrial disclosures, as required by  
16 law. This request encompasses, but is not limited to the following:

17 1. Exculpatory Evidence: Disclosure of any existing exculpatory  
18 evidence in accordance with the requirements of *Brady v. Maryland*, 373  
19 U.S. 83 (1963) and its progeny. Such disclosure also requires the government  
20 to reveal any information that would impeach the credibility of any of its  
21 witnesses in this case. Subsequent cases applying *Brady* indicate that non-  
22 disclosure of evidence impeaching the credibility of a government witness  
23

1 violates due process. *United States v. Bagley*, 473 U.S. 667 (1985); *Giglio v.*  
2 *United States*, 405 U.S. 150 (1972). Also, the *Brady* rule should be  
3 interpreted liberally on the side of disclosure. *United States v. Bailleaux*, 685  
4 F.2d 1105 (9th Cir. 1982).

5  
6 In *United States v. Sudikoff*, 36 F.Supp.2d 1196 (C.D. Cal. 1999), the  
7 district court noted that appellate standards of review for *Brady* errors are  
8 not appropriately applied in the pretrial context. *Id.* at 1198-99. Rather, the  
9 court ruled that "*Brady* requires disclosure of exculpatory information that is  
10 either admissible or is reasonably likely to lead to admissible evidence." *Id.*  
11 at 1200.

12  
13 Thus, this discovery request includes, but is not limited to, disclosure of  
14 the above mentioned discovery materials, as well as the following:

15 a. Bias of government witnesses. Any evidence that any prospective  
16 government witness is biased or prejudiced against the defendant or has a  
17 motive to falsify or distort his/her testimony. See *Pennsylvania v. Ritchie*,  
18 480 U.S. 39 (1987); *United States v. Strifler*, 851 F.2d 1197 (9th Cir. 1988).

19  
20 b. Prior record/other acts of government witnesses. Any evidence that  
21 any prospective government witness has engaged in any criminal act  
22 whether or not resulting in a conviction. See F.R.E. Rule 608(b) and *Brady*.

23 c. Investigation of witnesses. Any evidence that any prospective  
24

1 witness is under investigation by federal, state or local authorities for any  
2 criminal or official misconduct. *United States v. Chitty*, 760 F.2d 425 (2d  
3 Cir.).

4 d. Evidence regarding ability to testify. Any evidence, including any  
5 medical or psychiatric reports or evaluations, tending to show that any  
6 prospective witness's ability to perceive, remember, communicate, or tell the  
7 truth is impaired; and any evidence that a witness has ever used narcotics or  
8 other controlled substance, or has ever been an alcoholic. *United States v.*  
9 *Strifler*, 851 F.2d 1197 (9th Cir. 1988); *Chavis v. North Carolina*, 637 F.2d  
10 213, 224 (4th Cir. 1980); *United States v. Butler*, 567 F.2d 885 (9th Cir.1978).  
11

12 e. Personnel files. It is requested that the government review each  
13 agent's personnel file for review for information requested in paragraphs a-d  
14 above and determine whether there is any impeaching information contained  
15 in the files, *see United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991). This  
16 request encompasses not only law enforcement officials employed by the  
17 federal government, but also state and local law enforcement officers who  
18 have been involved in the case against the defendant. *See United States v.*  
19 *Fort*, 472 F.3d 1106, 1113 (9<sup>th</sup> Cir. 2007)(explaining that when local police  
20 participate in the investigation of a defendant they are federal "agents").  
21

22 f. Favorable testimony. The name of any witness who made an  
23

1 arguably favorable statement concerning the defendant or who could not  
2 identify him or who was unsure of his identity or participation in the crime  
3 charged. *Jackson v. Wainwright*, 390 F.2d 288 (5th Cir. 1968); *Chavis v.*  
4 *North Carolina*, 637 F.2d 213, 223 (4th Cir. 1980); *James v. Jag*, 575 F.2d  
5 1164, 1168 (6th Cir. 1978); *Hudson v. Blackburn*, 601 F.2d 785 (5th Cir.  
6 1975).

8 2. Cooperating Witnesses: Disclosure of the identity of any and all  
9 cooperating witnesses, co-defendants, persons, or informants, as well as  
10 exculpatory evidence pertaining to the cooperating witness, including, but  
11 not limited to:

13 a. Cooperation agreements. The terms of the witnesses' cooperation  
14 agreements, including benefits to the witnesses as well as expectations  
15 established for the witnesses and any rules of conduct or instructions given  
16 to the witness, be they formal or informal;

17 b. Law enforcement agreements. Any agreements entered into between  
18 a law enforcement agency and a cooperating witness, even if the agreement  
19 does not specifically cover any benefits of cooperation.

21 c. Suitability determinations for the witness.

22 d. Criminal records: Disclosure of arrest records, criminal conviction  
23 records, probations files and any other evidence pertaining to the informant's  
24

1 and/or cooperating witness' contacts with law enforcement. *United States v.*  
2 *Strifler*, 851 F.2d 1197, 1202 (9<sup>th</sup> Cir. 1988).

3 e. Investigation records: Disclosure of any and all pending or past  
4 criminal investigations involving the informant and/or cooperating witness,  
5 including but not limited to, any criminal investigation leading to the  
6 informant's agreement to work in this case. *United States v. Chitty*, 760 F.2d  
7 425 (2<sup>nd</sup> Cir. 1985).

8 f. Evidence suggesting lack of truthfulness. Disclosure of any and all  
9 information known to law enforcement regarding the credibility of the  
10 informant and/or cooperating witness whether that information was gained  
11 through this investigation or any other investigation that the informant  
12 and/or cooperating witness has been involved including but not limited to  
13 information regarding prior misconduct by the informant and/or cooperating  
14 witness, i.e., refusing to testify or assist the government/state, allegations of  
15 entrapment, false statements in criminal investigations, false testimony or  
16 information to law enforcement officials and/or in criminal proceeding, and  
17 any other acts of misconduct. *United States v. Uramoto*, 638 F.2d 84, 86-87  
18 (9<sup>th</sup> Cir. 1980).

19 g. Testing results. If given a polygraph exam and/or a UA, the results  
20 of any such examination and lab result for the UA performed on any  
21

1 informant and/or cooperating witness as well as concerning the failure of any  
2 potential government witness to submit to a polygraph exam or UA.

3 h. Use of controlled substances. The defense requests any information  
4 suggesting the witness's use of controlled substance. *See Benn v. Lambert*,  
5 283 F.3d 1040, 1056 (9th Cir. 2002) (error not to turn over evidence of  
6 informant's drug use).

7  
8 i. Prior testimony. It is requested that the government disclose any  
9 and all information regarding any reporting persons', informants', or  
10 witnesses' prior testimony in this or any other proceeding in which they have  
11 acted as a witness and/or informant, specifically including case names and  
12 numbers of any trials or evidentiary hearing at which the informant and/or  
13 cooperating witness has testified. *Johnson v. Brewer*, 521 F.2d 556 (8th Cir.  
14 1975).

15  
16 j. Treatment records. It is requested that the government disclose any  
17 and all evidence of the informants' psychiatric treatment, if any, or of any  
18 addiction or propensity to use or abuse controlled substances. *United States*  
19 *v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983); *United States v. Fowler*, 465  
20 F.2d 664 (D.C. Cir. 1972).

21  
22 k. Evidence of bias. The defense would request disclosure of any  
23 information regarding whether a government witness has any personal  
24

1 relationships or interests that might cause bias in the witness's testimony.

2 It is requested that the government be required to affirmatively review  
3 any and all law enforcement files for the foregoing information and disclose  
4 any and all potentially exculpatory information contained therein, including  
5 but not limited to, informant information. This duty arises from the Supreme  
6 Court's decision in *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 1567  
7 (1995).  
8

9 3. Statements by Mr. Rowell: Production of any and all relevant  
10 statements made by Mr. Rowell which are in the custody or control of the  
11 government, the existence of which is known by the government, or the  
12 existence of which may become known to the government by the exercise of  
13 due diligence, as required under Fed. R. Crim. P. 16(a)(1)(A) and (B). This  
14 request includes, but is not limited to, any statements made by Mr. Rowell  
15 before or after his arrest whether or not made in response to interrogation by  
16 any law enforcement official.  
17

18 4. Criminal Record: Disclosure of any prior criminal record of Mr.  
19 Rowell that is within the government's possession, custody, or control, or the  
20 existence of which is known, or which may become known to the government  
21 through the exercise of due diligence, as required under Fed. R. Crim. P.  
22 16(a)(1)(D).  
23  
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1        5. Recordings, Documents, and Tangible Objects: Disclosure and copies  
2 of and access to any photographs, books, papers, documents, tangible objects,  
3 buildings or places which either are material to the defense or are intended  
4 for use by the government in its case in chief, as well as copies of any audio  
5 and video recordings. Fed. R. Crim. P. 16(a)(1)(E). This request includes, but  
6 is not limited to, color copies of any photos taken during the course of the  
7 investigation, as well as telephonically recorded conversations, body-wire  
8 recordings, video recordings, and copies of any recorded buy money used in  
9 this investigation.  
10

11        6. Examinations and Tests: Disclosure of and access to any results or  
12 reports of physical or mental examinations or scientific tests or experiments  
13 which either are within the possession, custody, or control of the  
14 government, the existence of which is known, or the existence of which may  
15 become known to the government through the exercise of due diligence, as  
16 required under Fed. R. Crim. P. 16(a)(1)(F). This request includes, but is not  
17 limited to the chemical analysis report for any controlled substance seized in  
18 this matter and the lab test/ results of any fingerprint analysis conducted of  
19 the packaging materials of any controlled substances seized in this matter.  
20

21        7. Expert Reports: Production of the material described under Rule  
22 16(a)(1)(F) and (G) for each and every expert witness the government intends  
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24



1 to use in its case-in-chief at trial. Mr. Rowell would observe that Rule  
2 16(a)(1)(G) requires the government to produce more than merely any  
3 conclusions by any and all experts, but also the *basis* of such conclusions.  
4 This rule also applies to any witness whose testimony would be based on  
5 "specialized knowledge." This may include the testimony of law enforcement  
6 officials. *United States v. Figueroa-Lopez*, 125 F.3d 1241 (9th Cir. 1997). This  
7 request includes, but is not limited to, those training manuals and/or  
8 materials the arresting officers rely on as part of their training in drug  
9 investigations and arrests.  
10

11 8. Law Enforcement and Prosecution Reports: Production of all arrest  
12 reports, investigator notes, memos from investigating officers, sworn  
13 statements and prosecution reports which have not already been provided.  
14 These reports are available under Fed. R. Crim. P. 16, 26.2, and 12.1; the  
15 Jencks Act, 18 U.S.C. §3500, et seq, and *Brady v. Maryland*, 373 U.S. 83  
16 (1963). Again, this request includes, but is not limited to, DEA reports and  
17 law enforcement agencies that assisted in this investigations' reports/records  
18 generated as a result of the investigation of Mr. Rowell.  
19

20 9. Prior Witness Statements: Production of all witness statements as  
21 required under the Jencks Act, 18 U.S.C. § 3500, and Fed. R. Crim. P. 26.2.  
22

23 10. Witness Lists: Production of a list of witnesses that the government  
24

1 intends to call in its case-in-chief as well as a list of witnesses, including  
2 contact information, of the percipient witnesses that the government does  
3 not intend to call at trial. *United States v. Grace*, 526 F.3d 499 (9th Cir. 2008)  
4 (en banc); *United States v. Cadet*, 727 F.2d 1453, 1469 (9th Cir. 1984).  
5

6 11. Grand Jury Transcripts: Mr. Rowell requests disclosure of the  
7 grand jury transcripts prior to trial, as authorized by FRCrP 6(e)(3)(E).  
8 Grand jury transcripts constitute prior witness statements, and thus must be  
9 disclosed when a witness testifies at trial or a pretrial proceeding. *See* FRCrP  
10 26.2(a)&(f)(3). In order to comply with Rule 26.2, the government will  
11 inevitably need to order the grand jury transcripts prior to any trial or  
12 evidentiary hearing. Accordingly, given that this is an open file discovery  
13 case, Mr. Rowell requests that the government disclose the grand jury  
14 transcripts once they become part of the government's file and, in any event,  
15 no later than two weeks prior to trial or an applicable evidentiary hearing.  
16

17 12. Disclosure of Evidence under FRE 404(b), 608 and 609: Mr. Rowell  
18 requests the government provide counsel not only with potential 404(b), 608  
19 and 609 evidence through the discovery process, but also with notice of the  
20 government's intent to use such evidence. Defense counsel requests that the  
21 government provide the nature of the FRE 404(b), 608, or 609 evidence with  
22 sufficient particularity so that it can be identified prior to trial and  
23  
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1 addressed in appropriate motions *in limine*, outside the presence of the jury.

2 *See* 404(b)(2) (requiring pretrial notification of prior act evidence).

3 13. Timing of Production. It is requested that the court set a schedule  
4 for the disclosure of outstanding discovery materials. It is further requested  
5 that the government provide all material available pursuant to Fed. R. Crim.  
6 P. 26.2, sufficiently in advance of trial or motion hearings so as to avoid  
7 unnecessary delay prior to cross examination.  
8

9 Dated: January 28, 2014.

10 Respectfully submitted,

11 s/Rick L. Hoffman

12 Rick L. Hoffman, WA 9478

13 Attorney for KENNETH RICHARD ROWELL

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Alexander C. Ekstrom, Assistant United States Attorney.

s/Rick L. Hoffman